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November 13, 1995

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By Hand Delivery

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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In re: **GC Docket No. 95-21, In the Matter of Amendment of 47
C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations
in Commission Proceedings; Memorandum of Oral Ex
Parte Presentation**

Dear Mr. Caton:

The Federal Communications Bar Association, by its undersigned representative and in accordance with Section 1.1206(a)(2) of the Commission's Rules and Regulations, hereby respectfully submits for inclusion in the record of the above-referenced proceeding an original and one copy of a memorandum summarizing an oral ex parte presentation made to the Office of the General Counsel of the Federal Communications Commission in the subject proceeding on November 3, 1995. We apologize for the late filing of the memorandum.

Any questions concerning this matter may be directed to the undersigned.

Very truly yours,

John Griffith Johnson, Jr.
Chair, Ex Parte Rules Committee
Federal Communications Bar Association
c/o Bryan Cave LLP
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Enclosure (x 2)

cc: David H. Solomon, Esq., with enclosure (by hand delivery)
Deputy General Counsel, Federal Communications Commission

Barbara Wellbery, Esq., with enclosure (by first-class mail)
Chief Counsel, National Telecommunications and Information Administration,
United States Department of Commerce

Memorandum of Oral Ex Parte Presentation in GC Docket No. 95-21

Telephone Conversation on November 3, 1995

Call Placed to:

David H. Solomon, Esq. ("DHS")
Deputy General Counsel
Federal Communications Commission ("FCC")

Call Placed by:

John Griffith Johnson, Jr., Esq. ("JGJ")
Chair
Ex Parte Rules Committee
Federal Communications Bar Association ("FCBA")

SUMMARY OF PRESENTATION

JGJ initiated the conversation and explained to DHS that JGJ was not calling at the request of the FCBA's Executive Committee, but rather solely in his capacity as Chair of the FCBA's Ex Parte Rules Committee. JGJ explained that his call related to a letter to the FCC's Acting Secretary dated October 20, 1995 from the Chief Counsel ("Chief Counsel") of the United States Department of Commerce's National Telecommunications and Information Administration ("NTIA"). That letter was filed in GC Docket No. 95-21 by the Chief Counsel and copies of the letter were served upon the parties of record in GC Docket No. 95-21, including the FCBA. The letter summarized an oral ex parte presentation that had been made to the FCC's General Counsel and members of the Office of the FCC's General Counsel, including DHS, by the Chief Counsel and members of her staff on October 10, 1995.

JGJ expressed concern with respect to the following excerpt from Page 3 of the Chief Counsel's October 20 letter:

. . . [FCC] staff and NTIA agreed that, if the shared jurisdiction exemption were amended to include a disclosure requirement for essential facts, the rule would codify the current practice of ensuring that there is advance coordination before such disclosure, if any, is made. In addition, . . . [FCC] staff and NTIA agreed that any such rule would recognize that agencies that share jurisdiction with the . . . [FCC] retain control over the timing and extent of any such disclosures.

DHS responded that it is currently the FCC's practice (and that such practice would continue under the proposed new rule) that if a governmental agency entitled to invoke the so-called "shared jurisdiction" exemption under the FCC's ex parte communications rules (Section 1.1204(b)(5) of the FCC's Rules) requests the FCC not to disclose facts presented to FCC decision-making personnel in the course of a proceeding pursuant to that exemption, the FCC will not rely upon those facts. In other words, DHS explained, the FCC does now -- and would continue to -- require the representatives of a governmental agency invoking Section 1.1204(b)(5) to choose between suffering the FCC's disclosure of the facts contained in the exempt presentation on the record, or suffering the FCC's refusal to rely upon those facts in the FCC's decision in the matter.

JGJ also expressed concern with a more general issue arising under the proposed modification to Section 1.1204(b)(5), as well as under current Section 1.1204(b)(8) of the FCC's Rules. That issue is whether other governmental agencies should be entitled to make advocacy-oriented presentations to FCC decision-making personnel in proceedings subject to the FCC's ex parte communications rules and to enjoy exemption from the disclosure requirements of those rules for such presentations, except to the extent that "facts" contained in such presentations would have to be disclosed on the record by the FCC at the time that the FCC issues its decision in the matter if the FCC relies upon such facts in its decision. Stated differently, JGJ's concern was that purely policy-oriented advocacy (not involving the assertion of "facts") to FCC decision-makers by an agency entitled to invoke current Section 1.1204(b)(8) or proposed Section 1.1204(b)(5) would not have to be disclosed at any time in the record of the proceeding. JGJ expressed concern especially with respect to the circumstance that the exemptions under Sections 1.1204(b)(5) and 1.1204(b)(8) extend to agencies of the Executive Branch (including NTIA and the United States Department of Justice) and their politically-appointed officials, who can argue their policy positions to decision-making personnel at the FCC in proceedings otherwise covered by the ex parte communications rules, without ever having to suffer the disclosure of those presentations on the record of the proceedings.

DHS responded by stating that it is the FCC's practice under Section 1.1204(b)(8) to treat presentations of agency policy by representatives of the Department of Justice and the Federal Trade Commission as "facts" that would have to be disclosed, pursuant to the proviso clause of that rule, at the time that the FCC issues its decision in the matter, to the extent that the FCC relies upon such "facts." DHS also pointed out that at the time that the FCC adopted Section 1.1204(b)(8), no party petitioned for reconsideration of the rule as adopted. DHS further stated that FCC decision-making personnel devote a great deal of thought to this issue and, recognizing the possibility that the exemption is potentially susceptible to exploitation, FCC staff attempts to be sensitive to the concerns expressed by JGJ.